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July 13, 1999

Hon. Wayne L. Peterson, Presiding Judge
San Diego Superior Court
220 West Broadway
San Diego, CA 92101-3877

RE: County Grand Jury 1998-1999 Report: "Weeds in San Marcos"

Dear Judge Peterson:

In accordance with the provisions of California Penal Code § 933(c), this letter constitutes the response of the San Marcos City Council ("City Council") and the Mayor of San Marcos ("Mayor") on the final report entitled "Weeds in San Marcos" issued by the San Diego County Grand Jury ("Grand Jury").

FINDINGS

The City Council and the Mayor collectively respond to and comment upon each of the Grand Jury's findings, which have been paraphrased for convenient reference, as follows:

1. Finding: The City has adopted a purchasing system as set out in Chapter 2.30 of its Municipal Code. An agreement for the purchase of services contrary to Chapter 2.30 is void and any claim or demand against the City based thereon is invalid. City Municipal Code § 2.30.110 states in part as follows: "Except as otherwise provided in this Chapter, purchase of supplies, services and equipment of an estimated value of ten thousand dollars or more shall be by written contract with the lowest responsible bidder who submits a responsive bid pursuant to the following procedure." An exception is found in Municipal Code § 2.30.120 which states in part as follows: "Further, the City Council may by Resolution, designate types or classes of supplies, services and equipment costing more than ten thousand dollars which may be purchased through use of open market procedures. . ."

Response: The City Council and the Mayor agree with this finding. As a charter city, the City of San Marcos ("City") has the authority under California Constitution, Art. 11, Section 5 to contract for supplies and services using its own procedures. The City has established its own comprehensive procedures for purchasing services and supplies in Chapter 2.30 of the San Marcos Municipal Code ("Municipal Code"). Section 2.30.100 of the Municipal Code provides that "[u]nless

exempted from this Chapter, pursuant to Sections 2.30.180 or 2.30.190, purchases of supplies, services and equipment shall be by the bid procedures established by this Chapter."

2. Finding: The Grand Jury believes that the City should have competitively bid the weed abatement contract for services pursuant to Municipal Code § 2.30.110, unless the City Council had designated weed abatement services as a type or class of services to be purchased through use of open market procedures. The City has not designated this as an exempt service.

Response: The City Council and the Mayor partially disagree with this finding. The Grand Jury is correct when it states that the City Council has not designated weed abatement services as a type or class of services to be purchased through the use of open market procedures, which would thereby exempt a weed abatement contract from bidding requirements under Municipal Code § 2.30.110. However, there are two other Municipal Code sections that exempt the subject contract from bidding requirements.

First, Section 2.30.100(c) provides that "[b]idding may be dispensed ... (c) [w]hen the City Council finds that the commodity can be obtained from only one vendor...." In the past, the City has been unable to locate any other vendors that provide the wide range of services required by the City's weed abatement contract. As recognized by the Grand Jury, these services include research, complaint tracking, inspection, noticing, posting, cutting, billing, public information and data generation. Given the City's unsuccessful attempts to locate other vendors that provide the same range of services, and the fact that two other local agencies (*names?*) had recently put their weed abatement programs to bid and only received one response – from the City's current contractor, the City reasonably concluded that this contractor was the only vendor providing such services. Thus, the City was exempt from competitively bidding the weed abatement services contract ("Contract") under Municipal Code § 2.30.100(c).

The City was also exempted from putting the Contract out to bid by Municipal Code § 2.30.120(a). Section 2.30.120(a) provides that services may be purchased on the open market when the estimated value of the services to be purchased is less than ten thousand dollars ($10,000). Here, as the contractor receives all payments directly from the property owners whose weeds are abated, and as there are no costs to the City associated with the Contract, the contractor's services cost the City nothing. Thus, the City was exempted from the bidding requirements of Municipal Code Chapter 2.30.

3. Finding: The City's position is that it behaved properly since the contract costs the City nothing.

Response: The City Council and the Mayor disagree partially with this finding, in that it implies that the City's only basis for awarding the Contract without using formal

bidding procedures was that "the contract costs the City nothing." As addressed above in regard to Finding Number 2, the City was exempted from formal bidding procedures under Municipal Code § 2.30.120(a) as the Contract cost the City nothing – obviously under the $10,000 limit. However, the City also properly awarded the Contract under Municipal Code § 2.30.100(c), as the City reasonably determined that only one vendor provided the wide range of services required by the City's weed abatement contract.

4. Finding: Based on East Bay Garbage Co. v. Washington Township Sanitation Co. (1959) 52 Cal.2d 708 and the language of Municipal Code §2.30.110 as set forth above, the City should have competitively bid the contract for weed abatement service pursuant to Municipal Code §2.30.110. The East Bay Garbage Co. case relies upon the reasoning in McKim v. Village of South Orange, 44 A.2d 784, which provided that splitting costs among property owners that leaves them no choice but to incur and pay the expense does not alter the fact that an award of public work at a price of many thousands of dollars is being made to a private contractor without competition in bidding.

Response: The City Council and the Mayor disagree wholly with this finding. The City Council and the Mayor believe that the Grand Jury's reliance upon the case of East Bay Garbage Co. is misplaced. In East Bay Garbage Co., the California Supreme Court interpreted former Health & Safety Code § 6515.5, which required a sanitary district to award a contract by competitive bidding if the total cost of the work to be performed exceeded $2,500.

First, as is obvious, the Contract is not governed by former Health & Safety Code § 6515.5. Additionally, the Court's holding in East Bay Garbage Co. was limited to the award of garbage collection contracts by sanitation districts. The issue here is the award of a weed abatement services contract by a charter city. As noted above, the City – as a charter city – is given the authority under California Constitution, Art. 11, Section 5, to contract for supplies and services using its own procedures. The City has established such procedures in Chapter 2.30 of its Municipal Code, and these procedures were followed in awarding the Contract.

In finding that the City should have competitively bid the Contract, the Grand Jury also cited a 1945 New Jersey Supreme Court case, McKim v. Village of South Orange. In McKim, the New Jersey court held that a municipality could not circumvent a competitive bidding statute for garbage removal contracts by splitting the total cost of the contract among property owners whose refuse would be collected in order to avoid competitive bidding requirements.

Again, it should be noted that the McKim case involved a New Jersey city's ordinance addressing only garbage removal contracts. However, as it appears that the Grand Jury cited this case to support its conclusion that the City wrongfully avoided the

$10,000 limitation on the use of open market procedures, the court's analysis in the McKim case warrants a response by the City. As noted above, Section 2.30.120(a) of the Municipal Code provides that the City may purchase services on the open market without using formal bidding procedures when the services cost the City less than $10,000. Here, an important factor to remember is that the affected property owners have the ability to abate the nuisances themselves, or to enter into their own contract(s) with other landscape or similar services to abate the weeds at amounts within their control. Second, the weed abatement services cost the City nothing; thus, this chartered City was also exempt from putting the Contract to bid.

Even if the City did expend funds under the Contract, the Contract would still be exempt from formal bidding requirements under Section 2.30.120(a). The City may use open market procedures under Section 2.30.120(a) when the *estimated* value of the services to be purchased is less than $10,000. The $10,000 limitation is difficult, if not impossible, to apply to a contract for weed abatement services for two reasons. First, it is unknown when the Contract is awarded how many, if any, properties will be declared public nuisances because of weeds. The growth of weeds and other plants greatly fluctuates from year to year for various reasons, including the amount of rainfall received in the City. These factors are impossible to predict in any given year.

Second, it is even more difficult to predict the level of cooperation the City will receive from property owners. The more property owners are willing to remove the weeds on their property, the less the City will need the services of a contractor. Indeed, the responses of individual property owners to weed abatement efforts are even more difficult to forecast than annual precipitation amounts. For these reasons, the City would continue to be exempt from formal bidding requirements under Municipal Code § 2.30.120(a) even if it did expend funds under the Contract.

5. **Finding:** Even if the City can amend the Municipal Code to make it legal to negotiate a weed abatement contract rather than going through the bid process, it would be a mistake. Just as the Grand Jury was suspicious of the manner in which this contract was negotiated, it is likely that the public will have the same negative perception and it behooves the City to avoid projecting such an image.

Response: The City Council and the Mayor disagree wholly with this finding. As a charter city, the City has the authority under California Constitution, Art. 11, Section 5 to contract for supplies and services using its own procedures. The City has established its own comprehensive procedures for purchasing services and supplies in Chapter 2.30 of the San Marcos Municipal Code ("the Municipal Code"). The stated purpose for the City's adoption of its own purchasing system is found in Municipal Code § 2.30.010: "[T]he purchasing system set out in this Chapter is adopted in order to establish *efficient* procedures for the purchase of supplies, services and equipment ... at the *lowest possible cost* commensurate with quality needed...." (Emphasis added.)

While the Municipal Code generally requires that the City purchase supplies and services using the bid procedures established by Chapter 2.30, there are several express exceptions to the bid requirement which ensure that the City purchases its supplies and services efficiently and at the lowest possible cost. As noted above, these exceptions include those instances where the City Council determines that the services may be obtained from only one vendor (§ 2.30.100(c)) and when the services to be purchased cost less than $10,000 (§ 2.30.120(a)). Both exceptions to the bid requirement apply to the Contract, as previously discussed. Thus, the City believes that the public recognizes that the City followed its own purchasing procedures and thereby saved taxpayer funds. As the City knew that only one vendor could provide the wide range of services called for by the Contract, it would have been a waste of City personnel's time and taxpayer money to submit the Contract to bid. By following its purchasing procedures and saving taxpayer funds, the City projects a positive and responsible image to the public.

6. **Finding:** Although legal, the Grand Jury is concerned that the City is helping its contractor collect for weed abatement services, whether forced abatement or weed clearing services arranged by negotiation between the contractor and the property owner. In contrast, when a property owner contracts with a firm other than the City's contractor, collection for the work is solely the responsibility of the owner's private contractor. The Grand Jury believes that the City should conduct all of its dealings in such a way that there is never an appearance of impropriety. In this instance the City has fallen short of that goal, and it should not provide bill collection assistance for any contractor.

Response: The City Council and the Mayor partially disagree with this finding. The Grand Jury is correct when it states that the City has the ability to collect for weed abatement services performed by a private contractor. The City's authority to file tax liens against private property owners for weed abatement work performed by the City's private contractor – whether the abatement was ordered by the City or was the result of a contract between the property owner and the private contractor – has long been recognized under California law. In 1962, a California Court of Appeal held that "as a general rule municipalities have the power to provide for the summary abatement of nuisances by municipal officials, particularly where an emergency exists.... Equally well recognized is the power of the municipality in such instances to charge the cost of the abatement to the property owner and to assess or make such cost a lien against the property involved." Thain v. City of Palo Alto (1962) 207 C.A.2d 173, 189.

The court in Thain upheld the validity of a Palo Alto ordinance very similar to the City's weed abatement ordinance. In addition, the weed abatement work at issue in Thain was performed by a private contractor under contract with the City of Palo Alto. The court did not question the city's ability to collect money from private property owners for work performed by its contractor.

Furthermore, it is clear that the California legislature intended for municipalities to have the power to file tax liens and collect the monies owed for weed abatement work performed by private contractors. California Government Code §§ 39580 through 39586 (expressly adopted by the City in Municipal Code § 8.64.120) allow the county tax assessor to enter the cost of weed abatement – whether performed by a city crew or a private contractor – on the county tax roll and provide the means for collecting these assessments.

The City does not create "an appearance of impropriety" by following procedures established by the legislature and long recognized as valid by the California courts. If a property owner contracts with a private contractor other than the City's contractor for the abatement of weeds declared a public nuisance by the City – as is certainly within the property owner's rights – the property owner will receive the "benefit" of negotiating payment directly with that contractor. Should the property owner choose to use the City's contractor, it is contemplated that the property owner will pay the contractor directly for weed abatement services performed. The City will only file a lien against the property if the owner fails to pay the contractor or if the property is forcibly abated. This system ensures that weed abatement services are performed when needed at no cost to the City or its citizens. By virtually guaranteeing payment to the contractor, this system also ensures that there is a contractor willing to perform these vitally important services.

7. **Finding:** The Grand Jury concluded that there was not a questionable motive in issuing this contract to a private contractor outside the competitive bidding process. It appears that this action was a move by legally misinformed City officials in their effort to efficiently accomplish the City's mandate.

Response: The City Council and the Mayor disagree partially with this finding. As noted by the Grand Jury, the City did not have a questionable motive in issuing the Contract to a private contractor without utilizing the competitive bidding process. However, the City was not "legally misinformed" in doing so. As discussed at length above, the City, as a charter city, has the ability to establish its own purchasing procedures. Those procedures – found in Chapter 2.30 of the Municipal Code – were followed in awarding the Contract. The City may award a contract without submitting it to bid when there is only one vendor that provides the services required by the contract and where the cost of the contract to the City is less than $10,000. Finally, the City is clearly authorized under the Government Code and longstanding California case law to file tax liens against private property owners for weed abatement work performed by private contractors under contract with the City.

RECOMMENDATIONS:

The City Council and the Mayor respond to and comment on each of the Grand Jury's recommendations as follows:

Recommendation 99-50: The City Council should void the current contract for weed abatement services and, as soon as feasible, publish a Request for Proposals and put a weed abatement contract to public bid.

Response: The recommendation will not be implemented, as it is not warranted. The Contract is a valid and binding contract as it was awarded in accordance with the procedures established by Chapter 2.30 of the Municipal Code. As such, there is no authority for voiding the Contract and putting the weed abatement services contract to public bid.

Recommendation 99-51: The City Council should not modify the Municipal Code for the purpose of avoiding the need to publicly bid weed abatement contracts.

Response: The City Council will comply with this recommendation. The City Council will not "modify the Municipal Code for the purpose of avoiding the need to publicly bid weed abatement contracts." The Municipal Code specifies several exemptions from submitting certain contracts to public bid, and the current Contract was awarded pursuant to two of those exemptions, as discussed above. The City will continue to award contracts in accordance with the provisions of the Municipal Code, submitting most contracts to public bid as required by Chapter 2.30 but taking advantage of the Municipal Code's cost-effective and time-saving exemptions when appropriate.

Recommendation 99-52: The City Council should pay the City's contractor according to the contract schedule, when a property is cleared as the result of the owner's failure to abide by law and then take advantage of all legal means to collect for that abatement work from the property owner.

Response: The recommendation will not be implemented because it is not warranted. As discussed above, the California Government Code, California case law and the Municipal Code all provide long-standing authority for the City to place liens on private property when the property owner refuses abate weeds which have been declared a nuisance and/or to pay for such abatement work performed by the City's contractor. California courts have determined that this is a proper method for a weed abatement contractor to be compensated for work performed under contract with a municipality. Thus, in those situations where a private property owner refuses to pay for weed abatement work performed on his or her property by the City's contractor, the contractor will continue to receive payment for its services through the assessment lien process.

Recommendation 99-53: The City Council should not assist any future weed abatement contractor in its bill collection efforts whether for City-ordered work or for work resulting from a contract negotiated between the property owner and the contractor.

Response: The recommendation will not be implemented because it is not warranted. As discussed in regard to recommendation 99-52, the California Government Code, California case law and the Municipal Code all provide authority for the City to place tax assessment liens on private property resulting from weed abatement work resulting from a contract negotiated between the property owner and the City's contractor. In those rare instances where a property owner refuses to pay for work resulting from a contract negotiated with the City's contractor pursuant to the City's declaration of the property as a public nuisance, the City will continue to assist the contractor in receiving payment for its services.

Recommendation 99-54: The City Council should investigate citizen complaints regarding the treatment persons may have received from the current contractor or its agents and make all reasonable efforts to rectify justified complaints.

Response: The practice set forth in this recommendation has always been in place. As it has always done, the City will investigate any and all citizen complaints with regard to the treatment persons have received from the current weed abatement services contractor or its agents (and any City contractor or its agents) and make all reasonable efforts to rectify complaints that are justified.

CONCLUSION

Should you have any questions regarding the foregoing, please contact City Attorney Helen Holmes Peak, who can be reached at (760) 743-1226, ext. 108.

Mayor Corky Smith

Vice-Mayor Pia Harris

Councilmember Jim McAuley

Councilmember Hal Martin

Councilmember Mark Rozmus